

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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CAROL LEWIS,

Plaintiff,

v.

Case 1:15-cv-13530-NMG

ALEX AZAR,  
Secretary of the U.S. Department of Health  
and Social Services,

Defendant.

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**PLAINTIFF'S MOTION FOR LEAVE TO SUBMIT  
NOTICE OF SUBSEQUENT AUTHORITY**

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Plaintiff Carol Lewis respectfully files this Motion for Leave to Submit Notice of Subsequent Authority to bring to the Court's attention a decision issued on June 12, 2018 in *Whitcomb v. Azar*, Case No. 17-cv-14, (June 12, 2018) (ED Wisc., Jones, J.). Exhibit A. There, the Court addressed the same issues pending before this Court in Ms. Lewis' Motion for Fees. *See* Dkt. # 80. The *Whitcomb* decision held:

The Secretary's position is not substantially justified, as there is no reasonable basis for arguing that continuous glucose monitors are not primarily and customarily used to serve a medical purpose.

*Whitcomb* at 4. In addition, the Court rejected the Secretary's claim of "consistency" as evidence of substantial justification holding:

In fact, this "foolish consistency" – which the Secretary continues to propound despite this and other court's adverse decisions – demonstrates the unreasonableness of the Secretary's position.

*Id.* at 5-6 (internal citations omitted). Finally, the Court held that a "special factor" was present so that fees were awarded using the Parrish firm's usual and customary billing rates. *Id.* at 6-8. In

doing so, *inter alia*, the court noted the Parrish firm's specialized access to ALJ decisions related to CGMs. *Id.* at 7-8.

Thus, the *Whitcomb* court addressed, and rejected, the same defenses the Secretary offers here to an EAJA award and specifically contradicted the Secretary's claims regarding the holdings of the Wisconsin court.

Dated: June 18, 2017

Respectfully submitted,

CAROL LEWIS, By her attorneys,  
/s/ Laurie J. Bejoian  
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Certificate of Service

I certify that the foregoing will be filed through the electronic filing system of the Court, which system will serve counsel for Defendant electronically, on this the 18<sup>th</sup> day of June 2018.

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